CHAPTER 8

PROVISIONAL VOTING AND FREE ACCESS

This chapter is designed to aid county elections officials in determining when a voter should cast a provisional ballot, and what to do with that ballot once it has been voted.

<u>**Background**</u>
Provisional voting is intended to prevent disenfranchisement of voters due to voter registration errors or other unusual circumstances. If a voter appears at a polling place to vote in an election, and for some reason his/her name does not appear on the official roster of voters for that polling place, the voter may cast a provisional ballot if he/she claims to be both eligible to vote in the election and registered to vote in that jurisdiction. (HAVA Section 302(a).) Whether an individual is eligible to vote, and whether the provisional ballot will be counted, are matters to be determined by state and local elections officials "in accordance with State law." (HAVA Section 302(a)(4).) State law (Elec. Code, §§ 14310-14312) further specifies the procedures and criteria to be used in issuing and counting provisional ballots.

<u>**Notice to Voters**</u>
Both federal and state law provide that if an individual claims to be both eligible to vote and registered to vote in the jurisdiction in which he/she wants to vote, the elections official at the polling place is to notify the individual that he/she may cast a provisional ballot in that election. (HAVA Section 302(a)(1); Elec. Code, § 14310(a)(1).) In addition, HAVA Section 302(b) requires that elections officials post certain information at each polling place, including instructions on how to vote and how to cast a provisional ballot.

<u>**Who is Eligible to Cast a Provisional Ballot?**</u>
There are many reasons why it may be appropriate for a voter to cast a provisional ballot rather than a regular ballot, including the following:

♦ The voter's name does not appear on the list of registered voters and the eligibility to vote cannot be verified at the polling place; or

♦ The voter is designated on the list of registered voters as a first-time voter who registered by mail and is voting in a Federal election, but is unable, or refuses, to provide the required proof of identity; or

♦ The voter requested an absentee ballot, but has not returned the ballot by mail or brought it to the polling place; or

♦ The voter is voting during polling place hours that have been extended by a state or federal court; or

♦ The voter is registered to vote, but is attempting to vote in a precinct different from the one in which the voter is registered or assigned; or

♦ The voter has moved within the county, but did not update his/her voter registration information to reflect the move.

Note that for those voters who are casting provisional ballots because their name does not appear on the list of registered voters, the provisional ballot envelope offers another opportunity for elections officials to capture the necessary information to process the voter's registration affidavit. For instance, if the voter's identification has not been validated through Calvalidator, capturing the voter's driver's license number or the last four digits of his or her social security number as part of the provisional voting process will better enable elections officials to process the provisional ballot and clear any potential registration hurdles prior to the end of the canvass period. (*See also* Chapter 1).

Procedure for Casting a Provisional Ballot
HAVA includes very general requirements for provisional voting, and defers to state law for implementation. Section 302(a) of HAVA provides that an individual who claims to be both eligible to vote in an election and registered to vote in the jurisdiction (county) in which he/she desires to vote, but whose name is not included on the official roster of voters for that polling place, may cast a provisional ballot. The individual must sign a written affirmation of eligibility and registration prior to being permitted to vote provisionally. (HAVA Section 302(a)(2).) Once the individual's eligibility to vote under state law is confirmed, the provisional ballot will be counted in accordance with state law. (HAVA Section 302(a)(3)-(4).)

California state law provides more detailed criteria and information concerning the procedures for provisional voting. If it is determined that it would be appropriate for an individual to cast a provisional ballot, the elections official must advise the voter of his/her right to do so and provide the voter with written instructions. (Elec. Code, §§ 14310(a)(1)-(2).) Like HAVA, state law requires the voter to execute, in the presence of the elections official, a written affirmation stating that he/she is eligible to vote and is registered in the county where he/she desires to vote. (Elec. Code, § 14310(a)(3).) The voter is given a provisional ballot, which he/she votes and then places into the provisional ballot envelope. The voter then signs the envelope and deposits it into the ballot box. (Elec. Code, § 14310(b).)

In addition, every voter who is issued a provisional ballot must have access to instructions on how to correctly cast a provisional ballot in any language required by the Voting Rights Act. Voters must also be given similar instructions in writing on how to find out if their ballot has been counted through the "Free Access" system, discussed below. (*See also* Chapter 4.)

Procedure for Processing a Provisional Ballot

The provisional ballots are taken, along with the regular ballots, to the canvassing area. During the official canvass, the elections official compares the signature on each provisional ballot envelope with the signature on that voter's affidavit of registration. Once the voter's registration is confirmed, and the signature on the envelope has been verified, the ballot is separated from the envelope and counted as a regular ballot. If the voter's registration cannot be confirmed, the ballot is not counted, and the reason for not counting the ballot is recorded. (Elec. Code, § 14310(c)(1).) Only the votes for contests in which the voter is eligible to vote will be counted. (Elec. Code, § 14310(c)(3).)

Free Access System

HAVA requires that at the time a voter casts a provisional ballot, the elections official must provide the voter with written information concerning how the voter can find out whether his/her provisional ballot was counted, and if not, why not. (HAVA Section 302(a)(5)(A).) HAVA further requires each state or local elections official to establish a "Free Access System," such as a toll-free telephone number for voters to call or an Internet website that voters can access free of charge to obtain this information. (HAVA Section 302(a)(5)(B).) California state law also requires the establishment of this Free Access System. (Elec. Code, § 14310(d).)

Each county may determine how to establish its Free Access System, so long as the system meets the requirements of the law. In addition, the Secretary of State has determined that the following minimum standards apply to all county Free Access Systems:

- The system may not impose a fee for access;

- The system must be available during regular business hours, at a minimum, but should be available at all hours if possible;

- The system must treat all voters equally;

- The system may rely on a password, but the password may not include, in whole or in part, the voter's driver's license number, California ID number, or social security number;

- The system must reasonably ensure that access to information concerning an individual provisional ballot is restricted to the individual who cast the ballot;

- The system must not reveal how the voter marked his or her ballot;

- The system must reveal to the voter whether his or her provisional ballot was counted and, if the ballot was not counted, the reason why not;

- The system must inform the voter how to register to vote and provide every non-registered provisional voter with a form to register to vote;

- The system must be accessible to persons with disabilities and persons who do not speak fluent English;

- The system must establish a deadline following the election after which the "free access" information will be available;

- The system may, but is not required to, proactively and regardless of whether the voter requests the information, notify EVERY provisional voter whether his or her ballot was counted and, if it was not counted, the reason why not; and

- The system may, but is not required to, provide every provisional voter at a polling place a postage-paid return postcard for requesting "free access" information.

In accordance with federal and state law and guidelines, each County Elections Official's office has established a Free Access System for voters to determine if their Provisional Ballot was counted. Information about how to access each county's free access system can be found on the Secretary of State's website at http://www.ss.ca.gov/elections/type_of_free_access_system_1105.pdf.